No. 93-1456

In The

Supreme Court of the United States

October Term, 1994

U.S. TERM LIMITS, et al.,

Petitioners,

v.

RAY THORNTON, et al.,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Arkansas

AMICI CURIAE BRIEF OF ALASKA COMMITTEE FOR A CITIZEN CONGRESS, IDAHOANS FOR TERM LIMITS, NEVADANS FOR TERM LIMITS, LIMIT, LIMITS, AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

BOOKS AND TREATISES

ARTICLES, PAMPHLETS, AND NEWSPAPERS

TABLE OF AUTHORITIES – Continued

I. STATEMENT OF INTEREST

This brief is filed on behalf of several organizations who support the imposition of further qualifications upon the Congressional representatives of their respective states. These organizations are Alaska Committee for a Citizen Congress, Idahoans for Term Limits, Nevadans for Term Limits, LIMITS (based in Oregon), and LIMIT (based in Washington).

The qualifications, either proposed or enacted, supported by these groups are similar to the qualifications at issue in this case. Those qualifications are that certain incumbents are prohibited from appearing on ballots. This court's ruling on the constitutionality of the qualifications in this case will affect the qualifications provisions supported by the above amici.

The party filing this amicus brief is the Northwest Legal Foundation (NLF), a non-profit public interest law firm. It has filed amicus briefs with this court in several cases, including *Dolan v. Tigard*, No. 93-518, and *Pacific Northwest Venison Producers v. Smitch*, No. 94-20, both supporting the petitioner.

II. SUMMARY OF ARGUMENT

The Constitution does not prohibit the enactment of further qualifications imposed by states upon their Congressional candidates. Sections 2 and 3 of Article I do not prohibit the states from imposing further qualifications from those listed, and the 10th Amendment authorizes state action where the Constitution does not prohibit it.

This comports with the framers' and ratifiers' understanding of the Constitution. To prohibit imposition of such qualifications would frustrate sound public policy. Finally, the Arkansas term limits meet the requirements states must meet when imposing additional qualifications upon Congressional candidates.

III. ARGUMENT

A. Under the 10th Amendment the people of the respective states retain the authority to establish qualifications for Congressional candidates.

The 10th Amendment underscores and embodies one of the fundamental principles of the American political regime: the national government is a government of delegated powers, and all governmental powers not specifically delegated to it are retained by the states or the people. In accordance with this principle, the framers of the Constitution adopted a federal structure in which the national government was granted exclusive authority in a few areas. In all other areas, however, the states retained either exclusive, initial, or concurrent authority. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court recognized that the federal structure was best preserved through the political process – including, specifically, the states' "role in the selection . . . of the . . . Legislative Branch of the Federal Government." *Id.* at 551.

The States can preserve their influence within the federal structure, however, only if the few powers they are granted in the political process are construed broadly. *See generally*, Rapaczgnski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 391 (purely formal enforcement of state authority over the political process will not preserve state sovereignty). If the states cannot establish reasonable qualifications for those who represent them in Congress and thereby insure that their representatives do "represent", they are denied a significant procedural power by which to protect themselves in the political process. Consequently, whenever state power over the political process is at issue, this Court should adopt that construction of the Constitution which least circumscribes state authority. *Cf. Delluth v. Muth*, 491 U.S. 223 (1989); *Finley v. United States*, 490 U.S. 545 (1989). Specifically, this Court should construe §§ 2 and 3 of Art. I to permit the states, through popular amendment of their constitutions, to establish additional qualifications for their Congressional representatives.

1. The language of §§ 2 and 3 permits the states to establish additional qualifications for their representatives.

Sections 2 and 3 do clearly establish minimum qualifications for Congressional representatives which the states cannot alter. Equally clearly, they do not preclude the states from adopting additional, compatible qualifications. *Cf. Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991). ("The authority of a States' people to determine the qualifications of their most important government officials lies at

the heart of representative government . . . and is reserved under the Tenth Amendment . . . ")

In areas such as these where the framers contemplated that the national and state governments would both exercise authority, the Constitution often specifies minimal rules which the states must observe and by implication leaves to the states discretionary authority to establish other, constitutionally permissible rules. Thomas Jefferson considered §§ 2 and 3 illustrative of this pattern. Asked whether the States could add any qualifications to those which the Constitution had prescribed for their members of Congress, he replied that they could. He reasoned:

> Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualification's of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, of a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is

> reserved to the State. If, wherever the constitution assumes a single power out of many which belong to the same subject, we should consider it as assuming the whole, it would vest the General Government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed.

Basic Writings of Thomas Jefferson 725 (P. Froner, ed. 1944).

The text of §§ 2 and 3 permits this interpretation, as Congressman Randolph of Virginia pointed out in 1807. Debating a House committee report on the right of a Mr. McCreery to sit in the House, Randolph understandably expressed surprise that the Committee on Elections had construed § 2 of Art. I to preclude "the States from annexing qualifications to a seat in the House of Representatives." He rebuked the Committee (whose report the House did not adopt):

> Mark the distinctions between the first and the second paragraphs. The first is affirmative and positive. "They shall have the qualifications necessary the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," & c. No man could be a member without these requisites; but if did not follow that he who had them was entitled to set at naught such other requisites as the several States might think proper to demand. If the Constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally ran thus: "Every person who has attained the age of twenty-five

> years, and been seven years a citizen of the United States, and who shall, when elected, be a inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives." But so far from fixing the qualifications of members of that House, the Constitution merely enumerated a few disqualifications within which the States were left to act.

Speech of John Randolph, 17 *Annals of Congress*, 883-4 (1807).

Indeed, as Congressman Randolph probably knew, the delegates to the Constitutional Convention had refused to make the qualifications specified in § 2 and 3 exclusive when they deleted the phrase "and any person possessing these qualifications may be elected" from one of the original proposals.

2. The framers and ratifiers of the Constitution believed that the people in their respective states retained the right to add qualifications.

More specifically, the legislative history of §§ 2 and 3 suggests that both the framers and ratifiers of the Constitution though that the states retained the right to set term limits for their Congressional representatives. This Court has surveyed much of the legislative history in *Powell v. McCormack*, 395 U.S. 486 (1969), and correctly concluded that neither the framers nor the ratifiers wanted Congress (and perhaps, by extension, state legislatures) to have the power to establish additional qualifications. Madison, for example, considered such a power "improper and dangerous". 2 Farrand, *The Records of the Federal Convention of*

1787 250 (1966). And Hamilton emphasized the importance of "fixing" the qualifications of the office holders in a constitution. *The Federalist*, No. 60, at 361 (C. Rossiter, ed. 1961). Neither of these concerns, however, suggests that the people in their respective states ought not to be able to fix qualifications in their respective constitutions, so long as the additional qualifications are compatible with those specified in §§ 2 and 3 and are otherwise constitutionally permissible.

Moreover, recognizing that the people in the states have the power to add additional qualifications is consistent with the reason the delegates to the constitutional convention most likely declined to include additional qualifications (including the principle of rotation in office) to those of age, citizenship, and residency. The delegates simply wanted to constrict as little as possible the freedom of the people to choose their own representatives. *See e.g.* Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 320 (1987 ed.). ("The people are the best judge of whom ought to represent them" [speech of Robert Livingstone].) Thus, this Court in *Powell v. McCormack* wisely left open the question of whether the people in the states could add qualifications.

This Court should now recognize that the people may limit their own, otherwise untrammeled, power to elect whom they wish. *Cf.* Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1044 (1988). After all, a term limit may be one of the "effectual precautions" by which, according to Madison, the people can keep their representatives "virtuous whilst they continue to hold their public trust." *The Federalist*,

No. 57, at 350-1 (C. Rossiter, ed. 1961). To deny them that power in the name of preserving their sovereignty would be Orwellian. The people of Arkansas, exercising that sovereignty, have decided that they want to experiment with the principle of rotation in office and have voted to exclude from their ballot Senators who have served two terms and Representatives who have served three terms.

There is every reason to believe that the founding generation would endorse their decision in the circumstances in which they now find themselves. The framers, after all, generally subscribed to the idea that rotation in office was a good thing. Indeed, Jefferson thought the failure to include it in the Constitution was one of that document's two principal flaws (the other was the absence of a Bill of Rights). Letter from Jefferson to Madison, dated December 20, 1787, 2 *The Writings of Thomas Jefferson* 330 (1853). Similarly, George Mason, who had been a delegate to the Constitutional Convention, considered "periodical rotation essential to the preservation of republican government." 3 Elliot, *The Debates on the Adoption of the Federal Constitution* 485 (2nd ed. 1937). And in *The Federalist Papers* Madison conceded that tenure "for a limited period" was a defining characteristic of representatives in a republican government. *The Federalist*, No. 39, at 241 (C. Rossiter, ed. 1961).

The framers nevertheless saw no need to specify term limits in the Constitution because they assumed frequent elections would insure regular turnover in the membership of both houses. Madison, for example, predicted that "new members would always form a large proportion" of the House. 5 Elliot, *The Debates on the Adoption of the Federal Constitution* 225 (1836). One Anti-federalist

thought two-thirds of the House would be new each term. 2 *The Founders' Constitution* 51 (P. Kurland and R. Lerner, eds. 1987).

Election patterns in the century following the adoption of the Constitution justified the assumption of the founding generation. In the first Congressional election after General Washington was elected, forty percent of the incumbents were defeated. J. Fund, *Term Limitation: An Idea Whose Time Has Come* 3 (Cato Institute, Policy Analysis No. 141, October 30, 1990). It was not until the 57th Congress convened in 1901 that the percentage of new members dipped below 30%. By the time the 101st Congress convened in 1989, only 8% were new members. *Id.* at 4. Incumbents who choose to stand for re-election are virtually assured of winning. In 1986, for example, 98% of Congressional incumbents who stood for re-election won. In 1990, the rate "dropped" to "only" 96%. Cohen & Spitzer, *Term Limits*, 80 Geo. L. J. 447, 479 (1992). It "plummeted" in the 1992 elections to 88%. Note, *The Constitutionality of State Imposed Term Limits Under the Qualification Clauses*, 71 Tex. L. Rev. 865, 866 (1993). Whether 98% or 88%, these rates are dramatically higher than the framers and ratifiers anticipated.

Indeed, the rates are so high that Congressional office has become a sinecure. In one recent year more Congressmen were carried out of office in coffins than were sent packing by the voters. Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 Harv. J. L. & Pub. Pol. 95, 97 (1993). And in another, almost as many were hauled off to jail as were defeated at the polls. Los Angeles Times, May 18, 1990, at B7 ("Since 1988, six Congressmen went home,

and five were sentenced to the slammer"). This unfortunate pattern constitutes one of those crises which even "the most gifted of [the Constitution's] begatters" could not have foreseen; and this Court should heed the Great Chief Justice's admonition and construe the Constitution to enable the current generation to deal with the crisis, so long as the text and original understanding permit. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

3. Denying the people of the states the right to add qualification would frustrate sound public policy.

To deny the people of Arkansas the right to set term limits for their Senators and Representatives leaves them only two alternatives. They may simply refuse the vote for any incumbent, a choice they of course have every constitutional right to make. That choice would require them, however, to ignore all other political considerations, including, among others, the candidate's party affiliations, character, and position on the issues of the moment. The people of Arkansas might also reasonably fear that in deciding for whom to vote, they would too often succumb to short term pressures and discount, in any particular campaign, the long term value of the principle of rotation in office. Patrick Henry anticipated the dilemma when he warned the delegates to the Virginia Ratification Convention:

> The only semblance of a check on incumbents is the negative power of not re-electing them. This sir is but a feeble barrier, when their personal interest, their ambition and awareness come to be put in contrast with the happiness of the people.

3 Elliot, *The Debates on the Adoption of the Federal Constitution* 167 (1836). The people of Arkansas might thus prefer to adopt a self-denying ordinance, as all prudent political communities do. *Cf. Nightline: Congressional Term Limits*, ABC Television Broadcast, November 4, 1991. (Commenting on votes who complain about Congress but continue to vote for incumbents, Jeff Greenfield said: "It's almost as if the voters are saying: Stop me before I re-elect again.") Only term limits insure respect for the principle of rotation in office while allowing citizens as individual voters to act on all the other political considerations they deem relevant in every campaign.

Alternatively, Arkansas voters could reach out to their fellow voters across the country and demand a constitutional amendment that limited the number of terms which Congressmen could serve (much like the 22nd Amendment, which limits the President to two terms). But why should the people of Arkansas be required to resort to the arduous and probably futile task of seeking a Constitutional amendment to achieve this end, and why should the people in every state be required to observe the same policy?

The particular futility of trying to set term limits through constitutional amendment is self-evident, given the pivotal role Congress has historically played in the amendment process. Sitting Congressmen have a vested interest in preserving their right to run for re-election. Not surprisingly, they have bottled up every one of the over 100 proposed term limit amendments submitted

since 1975. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 7 (Congressional Research Service Report for Congress, Sept. 13, 1994). Only once in the country's entire history – in 1947 – has a term limits amendment reached the floor of the Congress. It garnered one vote. 93 *Cong. Rec.* 1963 (1947). It is inconceivable that those members of the founding generation who feared congressional control over qualifications would have given that very body a de facto veto over qualifications endorsed by the people of the states. Prudent men all, they would never have entrusted the chicks to the tender mercies of the fox.

Moreover, the states should not be forced to resort to constitutional amendments in order to test the value of new qualifications like term limits. That raises the cost of political change far too high and effectively destroys the states as the useful laboratories Brandeis envisioned. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory and try out novel social and economic experiments without harm to the country.") If the states are required to resort to constitutional amendment, they will be able to try out far fewer ideas and may be "stuck" far too long with those that turn out to be mistaken.

Happily, the question of term limits for Senator and Representatives is not a subject, like term limits for the President, which requires a uniform rule. Admittedly, the states do have a collective interest in insuring that no state sends to the Congress persons who do not meet certain minimum qualifications. Once those are satisfied,

however, individual states may have particular interests in adding additional qualifications to insure that their Senators and Representatives serve them well. Importantly, one state's adding qualifications to those prescribed in §§ 2 and 3 neither imposes costs on other states nor precludes them from adding different qualifications of their own.

There is certainly no reason to suppose, as some have suggested, that uniform qualifications will insure that Senators and Representatives reflect "national" rather than parochial concerns. More to the point, Congressmen should reflect, to some degree at least, the views of their constituents. Some might even think that was their responsibility. John Adams declared: "[The Legislature] should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." G. Wood, *The Creation of the American Republic, 1776-1787* 165 (1969). Nor is there any longer any need to fear, as did Justice Story, that a state might adopt qualifications that discriminated on the basis of religious views or occupation. Justice Story, *Commentaries on the Constitution of the United States* 99 (1928). The 14th Amendment would now prohibit the states from imposing any such qualifications.

B. Qualifications established by the people within the states must be non-discriminatory, must not severely restrict associational rights, and must be rationally related to important interests.

Although the people of the States retain the power under the 10th Amendment to add qualifications, the 14th Amendment circumscribes that power. This Court

has never evaluated the constitutional legitimacy of a qualification. It has, however, decided innumerable ballot access cases. In that process it has established a test which it should use in the present case. The Court summarized that test in *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), instructing lower courts to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." More recently, in *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), this Court elaborated on that balancing test:

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions the regulation must be "narrowly drawn to advance a state interest of compelling importance. . . . " But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. (Internal citations omitted.)

This standard would generally and wisely eschew strict scrutiny.

Few, if any, qualifications could satisfy a strict scrutiny standard. Qualifications are necessarily bright line rules, and such rules are always over and under inclusive. That is true, for example, of the age, citizenship, and residency qualifications in §§ 2 and 3 of Art. I. An age requirement may tend to insure maturity of judgment; but some younger persons may have mature judgment, and some older persons may lack it. Similarly, a citizenship requirement may tend to insure attachment to the country; but some who have been citizens for a brief period may love the country equally or more, and others who have been citizens forever may still lack any patriotic commitment. Residency requirements may tend to insure familiarity with the people of a state and their values and needs, but they similarly exclude some who are sufficiently informed and include others who know nothing about the state.

Since that is the nature of qualifications, all a court can reasonably demand is that qualifications be rationally related to some important purpose. In other words, this Court should ask whether the people of Arkansas could rationally consider some period of Congressional service a general indicator that such persons would no longer serve their interests as effectively as other persons without that length of service, recognizing that a term limit qualification-like the age, citizenship, and residency qualifications- is necessarily somewhat over and under – inclusive. *See Gregory v. Ashcroft, supra.* (The classification cannot be overturned unless the "facts on which the classification is apparently based could not reasonably be conceived to be true" by the people.)

The Court could insist, however, that a qualification serve an important or significant purpose. That insistence would reflect a realization that if qualifications could be added too easily or too often, they might cumulatively circumscribe too greatly the freedom of the people to choose those whom they wish to represent them. (In that connection, the Court might note that the Arkansas term limit provision will exclude far fewer candidates than do the age, citizenship, or residency qualifications of §§ 2 and 3.)

1. The Arkansas term limits do not discriminate invidiously.

Amendment 73 is clearly non-discriminatory. It does not discriminate on the basis of ethnicity, race, national origin, gender, sexual orientation, religion, age, physical condition, mental state, wealth, or political view. It discriminates solely on the basis of a person's prior service in the Congress; and despite Mr. Twain's quip that the Congress is the only permanent criminal class in America, this Court has never held that Senators and Representatives constitute a suspect or semi suspect class. They are in fact the antithesis of such classes. They are overwhelmingly male, predominantly white, and generally affluent. Gorshuch and Guzman, *"Will the Gentleman Please Yield?" A Defense of State Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 372 (1991). (Congress is 95% male and 93% white, and 1 out of 10 Representatives and 1 out of 4 Senators are millionaires.)

2. The Arkansas term limits do not severely restrict associational freedoms.

While Amendment 73 does affect certain associational rights, the ones that it directly impacts – the rights to run for office and to vote for a particular candidate – are not fundamental. *Clements v. Flashing*, 457 U.S. 957, 963 (1982) (candidacy for public office is not a fundamental right); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (regulations that "limit the field of candidates from which voters might choose" are not subject to strict scrutiny).

More importantly, the Amendment's write-in provision largely vitiates the impact of term limits on these rights. Those who have served the prescribed limits may still mount write-in campaigns. Because of their name recognition, political connections, and record of service, incumbents are especially well situated to wage such campaigns successfully. And voters continue to have the right to vote for whomever they please *Socialist Labor Party v. Rhodes*, 290 F.Supp. 981, 987 (S.D. Ohio 1968) ("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise.")

3. The Arkansas term limits further important interests in a rational manner.

Term limits are an idea whose time has come. They are intended to serve a variety of important purposes. They may encourage new people with fresh ideas to enter politics. They may encourage representatives to fashion public policy on the basis of principle. They may reduce the influence of money in political campaigns. They may

prevent the growth of a permanent political class more interested in preserving their privileges than in serving the needs of their constituents. The latter is certainly a concern which the framers and ratifiers of the Constitution would have considered, not just legitimate or even important, but compelling.

A people committed to the idea that robust democracy depends upon rotation in office could find no more effective means to achieve that goal than term limits. The people of Arkansas declared in the preamble of the initiative they adopted that "entrenched incumbency has reduced voter participation and has led to an electoral system that is less free than the system established by the Founding Fathers." The use of term limits to preserve "government of the people, by the people, for the people" has a long and honorable history in the country. Many states currently enforce term limits for state officials, and the 22nd Amendment underscores the rationality of term limits as an effective check on tyranny.

Of course, term limits may fail to restore the kind of representative democracy that the Founding Fathers envisioned. Term limits may also entail perverse consequences States that adopt term limits may find themselves disadvantaged *vis a vis* other states because of the Congressional seniority system. Congressmen may not have sufficient time to acquire expertise in complicated areas of public policy. The entrenched bureaucracy may become all-powerful. If any or all of these consequence materialize, the people of Arkansas remain free, of course, to junk term limits through the same process by which they adopted them.

The point is not whether term limits pass some kind of judicial cost-benefit analysis but whether the citizens of Arkansas ought to have the right to try them. In short, the desirability of term limits should be fought out on the political playing fields of the country. The U.S. Supreme Court has no business refereeing that fight, beyond insisting that such provisions respect associational rights, be non-discriminatory, and rationally serve some important interest(s) of the people.

This is then a case whose decision requires the Court to recur to first principles. The first principle of the American political regime is that the people are sovereign. If "governments are instituted among men" for the purpose of securing their "unalienable rights" and "the people" have "the right to alter or abolish" any government "whenever [it] becomes destructive of these ends," surely the people of Arkansas may exercise the lesser right of imposing term limits on their Congressmen in the hope of making their Senators and Representative responsive to them, their wants, and their needs.

IV. CONCLUSION

The Constitution does not prohibit the imposition of further qualifications by states upon their Congressional candidates. The people of Arkansas should be allowed to exercise their sovereignty and experiment with term limits for their Congressional candidates.

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Respectfully submitted,

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